

**BEFORE THE LANE COUNTY HEARINGS OFFICIAL
ORDER OF CIVIL PENALTY**

CIVIL VIOLATION NO.: CA 10-0200

**ATR LAND, LLC,
LEELYNN, INC., and
WILEY MT., INC., RESPONDENTS**

DATE: March 6, 2012

Nature of Proceeding and Order:

This is a reconsidered order in a contested case proceeding concerning the appeal of a notice of civil violation issued by Lane County (County) to ATR Land, LLC, LeeLynn, Inc., and Wiley Mt., Inc., alleging violation of Lane Code 16.216(5) and Lane Code 16.257(2)(f), regarding failure to secure a required site review permit for quarry mining occurring on tax lot 3400, assessor's map 19-01-20. An earlier order was issued on February 14, 2012. Subsequently, the County requested that I reconsider his earlier decision. I agreed to reconsider that decision and this reconsidered order replaces that previous order.

Ruling: *The appeal of the December 13, 2011 Notice of Failure to Comply for violation of Lane Code 16.216(5) and Lane Code 16.257(2)(f) on November 11, 15, 25, 2011 and for December 2, 6 – 9, 12, and 13, 2011 is upheld and the Notice of Failure to Comply is dismissed.*

The appeal of the December 20, 2011 Notice of Failure to Comply for violation of Lane Code 16.216(5) and Lane Code 16.257(2)(f) 2011 is upheld and the Notice of Failure to Comply is dismissed as it applies to December 14 and 15, 2011. The appeal is dismissed and the Notice of Failure to Comply is upheld as it applies to October 18, 2011, December 16 and 19, 2011.

The Respondents are ordered to pay a civil administrative penalty to Lane County in the amount of \$3,510.

Code Sections Alleged to Have Been Violated:

The Notice of Civil Violation alleges violation of the following regulations:

Section 16.216(5) of the Lane Code provides that uses permitted by LC 16.216(4)(a), (b), (c), and (e) shall be subject to the provisions of LC 16.257.

Section 16.257(2)(f) of the Lane Code, which provides that a site review permit shall be required when a zone in this chapter specifically requires a site review permit for uses permitted outright or conditionally in said zone.

Penalty Rule:

Section 5.017(1) of the Lane Code provides:

“When the Director or designee determines that a responsible person has violated or is violating any provision of a chapter of this Code that contains a provision authorizing the imposition of an administrative civil penalty, the Director or designee may impose an administrative civil penalty as provided in LC 5.017(2) through (11) below.”

Section 5.005 of the Lane Code defines a “responsible person” to include:

“For violations of Chapters 5, 9, 10, 11, 13, 15 and 16 of the Lane Code, the owner of a building or property where a violation has occurred, the person in charge of the building or property, the violator, ...”

Record:

The evidentiary record in this proceeding consists of electronic recordings (on DVD) of the January 5, 2012 and January 24, 2012 hearings and the following exhibits and sworn testimony:

Exhibits submitted by Lane County and the Respondents are contained in Attachment A to this decision.

The following witnesses testified under oath:

Jane Burgess	Jen Dragovich
Jane Van Dusen	Tom Baxter
Carolynn Walker	Jenny Buckley
Kim Metzler	Debbie Koetz
Courtney Campbell	John Tyler
Alfred Soeldner	Arlan Marcus
Matt Laird	Phillip Velie
Sharon Latimer	Greg Demers
Rafael Sebba	

The Hearings Official takes official notice of all statutes, constitutional provisions, and rules cited by the parties orally or in writing, including but not limited to:

Lane Code Chapter 5
Lane Manual Chapter 5

The January 5 and 24, 2012 hearings in this matter were recorded onto a single DVD, which is part of the record of this proceeding.

Evidentiary Standard:

All findings of fact herein are made based upon the determination of the hearings officer that they are supported by a preponderance of the evidence in the formal record made at the contested case hearing in this matter on January 5, 2012 and January 24, 2012.

Findings of Fact:

1. The January 5, 2012 hearing on the Respondents' appeal of two Lane County Notices of Failure to Comply was held at 2:00 pm in Harris Hall at 125 E. Eighth Avenue, Eugene, Oregon. This hearing was continued to January 24, 2012 at 9:00 am at the same location.
2. The Respondents own tax lot 3400, assessor's map 19-01-20, hereinafter referred to as "the subject property." The Respondents also own tax lots 200, 300, 1500, and 1501, assessor's map 19-01-20 and tax lots 801 and 1501, assessor's map 19-01-21. Properties adjacent to the west, south, east and northeast of the subject property (with the exception of the railroad right-of-way to the northeast) are zoned RR-5 Rural Residential.
3. On October 20, 2010, Jane Burgess of the Lane County Compliance Office sent the Respondents a Request for Voluntary Compliance, notifying them that a site review permit was required in conjunction with Oregon Department of Geology and Mineral Industries Operating Permit #20-164.
4. The Respondents agreed to the modification of the December 20, 2011 Notice of Failure to Comply by stipulating that on October 18, 2011 20 to 25 truckloads of rock was removed from the subject property. The rock was trucked through the buffer zone and off the subject property via the easement to the south that connects the subject property with Rattlesnake Road. The rock was transported to the Fall Creek area.
5. On November 11, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by testimony of Courtney Campbell, Tom Baxter and Sharon Latimer through a video submitted by Ms. Campbell.
6. On November 25, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Jenny Buckley and Jen Dragovich.

7. On December 2, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by testimony of Sharon Latimer and a picture taken by Ms. Latimer.
8. On December 6, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Sharon Latimer, Jen Dragovich and Alfred Soeldner.
9. On December 7 and 8, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Alfred Soeldner, Jane Van Dusen, Sharon Latimer and Courtney Campbell.
10. On December 9, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Sharon Latimer and Courtney Campbell.
11. On December 12, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Tom Baxter, Jenny Buckley, Jane Van Dusen,Carolynn Walker, Sharon Latimer and Arlen Marcus.
12. On December 13, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented by the testimony of Tom Baxter, Jenny Buckley, Jane Van Dusen,Carolynn Walker, Courtney Campbell, Debbie Koetz.
13. On December 14, 2011 the Respondents conducted quarry and mine extraction, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented through testimony by Kim Metzler, Arlan Marcus, Jane Van Dusen, Jenny Buckley, Tom Baxter. The activity was also documented by pictures taken by Ms. Van Dusen and copies of four black and white photographs submitted by Mr. Baxter.
14. On December 15, 2011 the Respondents conducted quarry and mine extraction operations, as defined by Lane Code 16.216(3). This activity occurred on the subject property but not within the 200-foot setback area. This operation was documented through testimony by Courtney Campbell, Jan Van Dusen, Jenny Buckley, Alfred Soeldner, Arlan Marcus, Debbie Koetz,Carolynn Walker and

Tom Baxter and a color video submitted by Ms. Campbell and copies of three black and white photographs submitted by Mr. Baxter.

15. On December 16, 2011 the Respondents conducted quarry and mine extraction operations, as defined by Lane Code 16.216(3). This operation was documented through testimony by Kim Metzler, Tom Baxter, Alfred Soeldner, Arlan Marcus, Sharon Latimer, and Jane Van Dusen and copies of color photographs submitted by these three individuals. On this date, John Tyler observed trucks operating within the buffer area surrounding the mining operation.
16. On December 19, 2011 the Respondents conducted quarry and mine extraction operations, as defined by Lane Code 16.216(3). This operation was documented through testimony by Jen Dragovich and two electronic photographs submitted by Ms. Dragovich. Excavation was also witnessed by Arlan Marcus, Debbie Koetz, Jane Van Dusen, Carolyn Walker, Sharon Latimer, and John Tyler. On this date, John Tyler observed trucks operating within the buffer area surrounding the mining operation.
17. On December 13, 2011 the Respondents were issued a Notice of Failure to Comply. This notice alleged violations of Lane Code 16.216(5) and Lane Code 16.257(2)(f) occurring on November 11, November 25, December 2, December 6 through 9, December 12 and December 13, 2011.

On December 20, 2011, a second Notice of Failure to Comply was issued to the Respondents. This notice included additional alleged violations of Lane Code 16.216(5) and Lane Code 16.257(2)(f) for December 14 through 16, and December 19 of 2011. This notice computed a daily fine of \$1,170 for 3 days.

18. The Respondents have staked out a buffer around the portion of the subject property that is zoned QM and that is subject to mineral excavation. This buffer area, which is marked with stakes, extends 200 feet back from the borders of the subject property. In addition, the Respondents have acquired various parcels to the north, east and south of the QM-zoned portion of the subject property for buffer purposes.
19. On December 21, 2011, Lost Creek Rock Products, LLC filed an application with the County for site review permit approval for quarry mining on tax lot 3400, assessor's map 19-01-20.

Application of Law to Facts:

The crux of the issue in this case concerns the reading of Lane Code 16.216(5). This provision reads as follows:

“Site Review Required. Uses permitted by LC 16.216(4)(a), (b), (c), (d) and (e) above shall be subject to the provisions of LC 16.257 (Site Review).”

The County interprets this provision to mean that a site review permit is automatically required for the extraction and storing of minerals and related activities on property zoned QM Quarry Management. It then points to Lane Code 16.257(2)(f) that expressly requires a site review permit when required by the underlying base zoning district.

The Respondents argue that the language of Lane Code 16.216(5) is merely a pointer to the site review provisions of Lane Code 16.257 and only a reading of the latter in conjunction with the factual situation will determine whether a site review permit is necessary.

Much of the argument rests with the interpretation of Lane Code 16.257(3)(c), that states that it “...*is not necessary to require a Site Review Permit when: ...[T]he proposed uses or improvements are located at least 200 feet from all exterior boundaries of the subject property.*” The County suggests that this is a discretionary provision, contrasting it with the “shall” language in Lane Code 16.257(2)(a). I disagree for several reasons.

First, the plain meaning of the caption and title of Lane Code 16.257(3) is quite specific: “Site Review Permits Not Required.” Nor is the following language that states “it is not necessary to require a Site Review Permit ...” ambiguous. There are no criteria listed that could be used to evaluate whether a listed use would nevertheless require a site review permit and no level of discretion is implied. If a use listed in Lane Code 16.257(3) is present then it does not require a site review permit. A decision that nevertheless required a site review permit would, by definition, be arbitrary and violate substantive due process. Certainly, it is contrary to the due process principles imbued in the Oregon land use law since the *Fasano* case.¹

Second, the caption or introductory title of Lane Code 16.216(5) requires “site review” not a “site review permit” and I believe there is a meaningful distinction between the two. Accordingly, the provision goes on to clarify that the listed uses are subject to the provisions of LC 16.257, not simply the provisions of Lane Code 16.257(4), which are the criteria for site review evaluation. Thus, all of the provisions of LC 16.257 are applicable to the review, including those that provide for an exemption from the requirement for a site review permits, such as Lane Code 16.257(2)(a) or (3). Consistent with this logic is the language of Lane Code 16.257(2)(f) that states that a site review *permit* is required where a zoning district requires a site review *permit*. [*emphasis mine*] It does not say a site review permit is required where a zoning district requires site review.

In the present case, the Respondents have created and marked a 200-foot setback from the boundary of the subject property to serve as a buffer. Extraction, storage and processing of minerals that occur within this area are 200 feet or more from adjacent

¹ *Fasano v. Board of County Comm’rs*, 264 Or 574, 507 P2d 23 (1973)

residential zoning and therefore do not have to rely upon the exemption contained in Lane Code 16.257(3). Lane Code 16.257(3), however, is actually more rigorous than Lane Code 16.257(2)(a), as it requires the 200-foot setback from all property boundaries, regardless of adjacent zoning, to escape the necessity of obtaining a site review permit.

One of the purposes of the QM Zone, as expressed in Lane Code 16.216(1)(b), is to protect major deposits of rock and minerals. Lane Code 16.216(2) explains that the QM Zoning designation is only applied after the application of the conflict resolution process of Statewide Planning Goal #5. Mineral and Aggregate Resources Policy 9 of the Rural Comprehensive Plan notes that mineral extraction sites with potential conflicts shall be placed in QM/SR Districts. As the QM zoning of the subject property is not burdened with a SR suffix, it must be assumed that there is no intent to automatically subject the entire property to site review but that a site review permit will be required if appropriate to the situation. This reading is consistent with my determination in PA 0399-94,² issued in 1995, that neither the application of the Goal #5 ESEE analysis nor the absence of an /SR suffix precludes the application of Lane Code 16.257. Indeed, in that case and in the present case, a review of the site review requirements of Lane Code 16.257 must be conducted. The distinguishing factor in the two cases, however, is that in the present case there exists a 200-foot operational setback from property lines.

It is my determination then that activities that are outlined in Lane Code 16.216(4)(a)–(e), and accessory uses included in Lane Code 16.216(4)(k), that occur 200 feet or more back from the boundaries of the subject property, are exempt from the requirement of a site review permit.

At this point, it is important to clarify the boundary of the subject property. The Respondents argue that it is not just tax lot 3400 but rather all of the land under the control of Lost Creek Rock Products, LLC, which leases the QM zoned land as well as the F-2 zoned land adjacent to the north, the F-2 and RR-5 land adjacent to the east, and the RR-5 land adjacent to the south. The Respondent's application for site review, received December 21, 2011, however, only lists tax lot 3400, which is consistent with the Respondents' permit with DOGAMI. In theory, I think that the Respondent's argument has some validity but at this point in time the "subject property" must be equated with the boundary utilized in the application for site review; tax lot 3400.

The larger question is whether the uses accessory to mineral extraction and the existing roads that lie in the setback area are subject to site review. I strongly believe that they should be as it is this Hearings Official's observation in the previously cited Oregon Rock Products case, that the major impact upon nearby residents wasn't the excavation or processing of the quarry rock so much as it was the noise, dust, vibration and traffic congestion caused by the aggregate trucks traveling through their neighborhood. Indeed, this is precisely the type of impact that a site review permit is intended to address. Among other criteria, Lane Code 16.257(4)(f) provides that site review provides a

² *In the Matter of Oregon Rock Products, Inc.*, Lane County Hearings Official "Response to Motion for Dismissal" in PA 0399-94 (2/13/1995)

mechanism to evaluate on- and off-site impacts from the anticipated traffic generation of a use.

In my previous decision, I was unable to find any justification in either Lane Code 16.216 or 16.257 to require that site review be applied to the aforementioned activities. A more thoughtful review of the County's argument has convinced me that that analysis was overly conservative. While I am convinced that the QM-related uses that occur within the 200-foot setback are shielded from the requirement of obtaining a site review permit, I do not believe that the same can be said for those QM-related uses that occur outside of the protected area; within the setback and beyond.

While it is true that Lane Code 16.216(5) only subjects the uses listed in Lane Code 16.216(4)(a)–(e) to the site review process, it is equally true that Lane Code 16.257 only shields non-residential uses from the necessity of a site review permit when those uses are buffered from adjacent residential zones by a 200-foot setback area. This is clearly a situation where provisions of the code are, if not ambiguous, at least overlapping. I believe that the County was correct in arguing that in these situations Lane Code 16.009 requires that the more restrictive provisions be applied and, in this case, require a site review permit. The record indicates that the Respondent's conducted QM-related activities within the 200-foot setback area on December 16 and 19, 2011 and within the 200-foot setback area, on an easement connecting the subject property to Rattlesnake Road, and onto Rattlesnake Road, on October 18, 2011.

Conclusions of Law:

A. Violation

It is the duty of the hearings official to apply the law as best that he or she can interpret the intent of the County Commissioners, not to interpret the law as he or she believes that it should be written. Sometimes, as in the present case, the awkwardness and imprecision of code language either effectively masks the legislative intent or makes it impossible to implement that intent through the reasonable application of accepted rules of statutory construction. In this regard, I hope that it will soon be possible to rewrite either Lane Code 16.216 or Lane Code 16.257 to more evenly balance the protection of existing mineral resources with the protection of surrounding neighborhoods.

Based on record in this matter and the application of applicable sections of Lane Code 16.216 and Lane Code 16.257, this Hearings Official believes that a preponderance of the evidence supports a conclusion that the Respondents have not violated Lane Code 16.216(5) or Lane Code 16.257(2)(f) in regard to the QM-related operations that have occurred wholly within the 200-foot setback.

This decision departs from the previous decision by holding that QM-related operations that occur within the 200-foot setback or outside of the setback,

whether they be those uses listed in Lane Code 16.216(4)(a)–(e) or uses accessory to those uses, require a site review permit.

Based on record in this matter, the Hearings Official believes that a preponderance of the evidence supports a conclusion that the Respondents have violated Lane Code 16.216(5) and Lane Code 16.257(2)(f) on three occasions.

B. Penalty:

Lane Code 5.017(4) states that the amount of a civil penalty shall be determined in accordance with Section 5.020 of the Lane Manual. Section 5.020(1) of the Lane Manual provides that the dollar amount of an administrative civil penalty assessment is calculated by multiplying the amount of the BASE by the MULTIPLIER and multiplying that figure by \$15.00. The requisite formula is as follows:

1. Base Penalty (H+P+R+C+E)

History (H): The history of the responsible person taking all feasible steps of procedures necessary or appropriate to correct the violation.

I find that the appropriate factor is found in Lane Manual 5.020(1)(a)(i)(cc), on the basis that the Respondents had taken little or no action to correct the problem prior to the issuance of the Notice of Failure to Comply. Therefore, I find a value of “4” should be applied.

Prior Violations (P): The number of prior violations of the code provision upon which the current violation is based.

This is the first violation of the applicable code provisions by the Respondents in the last two years. In accordance with Lane Manual 5.020(1)(a)(ii)(aa), I have assigned a value of “1” to this factor on the basis that the record does not identify any prior violations of the building code.

Nature of the Occurrence (R): Whether the violation was repeated or continuous as opposed to a single occurrence.

In accordance with Lane Manual 5.020(1)(a)(iii)(bb), I will assign a value of “2” to this factor on the basis that the violation was continuous, having been documented on three occasions.

Cause (C): Whether the violation an inadvertent, negligent or a reckless or intentional act.

The County has determined that the violation was caused by intentional conduct by the Respondents and the Respondents acknowledge this fact. In

accordance with Lane Manual 5.020(1)(a)(iv)(cc), I have assigned a value of "4" to this factor on the basis that the violations are the consequence of the Respondents' intentional conduct.

Cooperativeness (E): The Responsible Person's cooperativeness and efforts directed toward correcting the violation.

Lane Manual 5.020(1)(a)(v) provides two options for evaluating whether the Respondents have been cooperative. Either they have not and receive a value of "2" to this factor or they were cooperative and a value of "0" is awarded. I have no choice but to assign a value of "2" to this factor on the basis that the Respondents proceeded with their mineral extraction operations despite several notices by the County that a site review permit was required.

2. **Multiplier** (A x G)

Prior Enforcement Actions (A): Number of prior enforcement actions taken against the Responsible Person by Lane County, whether for this property or another and whether for this type of violation or another.

There has been no prior enforcement action against the Respondents within the last three years. In accordance with Lane Manual 5.020(1)(b)(i)(aa), I have assigned a value of "1" to this factor on the basis that this is the first enforcement action taken against the Respondents by Lane County.

Magnitude of the Violation (G): The immediacy and magnitude of the violation.

In accordance with Lane Manual 5.020(1)(b)(ii)(bb), I agree with the County and have assigned a value of "2" to this factor on the basis that the violation is significant but does not pose an immediate threat to health, safety or the general welfare and has only minor potential consequences.

3. **Commercial Gain**

Lane Manual 5.025(2) provides that in cases involving commercial gain, the dollar amount of the assessment shall be multiplied by a factor of three (3) provided that the maximum assessment for a failure to comply of a single day shall be \$2,500. In the present case, it must be presumed that the quarry mining operations conducted on the subject property will, eventually, result in commercial gain.

4. **Penalty Calculation**

Base (4 + 1 + 2 + 4 + 2) x Multiplier (1 x 2) x \$15 x number of days

[Base (13) x Multiplier (2)] x \$15

26 x \$15 = \$390/day

\$390 x 3 (commercial gain penalty) = \$ 1,170/day

\$1,170 x 3 days = \$3,510

Judicial Review:

Lane Code 5.030(4) provides that a motion to reconsider the order of the hearings officer must be filed within 10 days of an order.

This decision, which is otherwise final upon the below-listed date, may be appealed by Writ of Review as provided by ORS 34.010 through 34.100. ORS 34.030 provides that the petition for the writ must be made within 60 days from the date of the decision sought to be reviewed.

Dated, issued, and mailed this 6th day of March, 2012.

By:


Gary L. Darnielle
Lane County Hearings Officer